

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In the Matter of  
Revision of Part 22 of the  
Commission's Rules Governing  
Part 22 of the Public Mobile Services

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Docket 92-115

To: The Commission

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REPLY TO PROPOSAL BY  
CTIA AND TIA RELATIVE TO  
REPAIR CENTER MODIFICATIONS TO ESNs



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President

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The Independent Cellular Services Association (ISCA) is opposed to any changes to FAR 22.919 as published in the Federal Register, November 17, 1994. We believe that the rule is sufficient, if enforced, to address concerns of the Federal Communications Commission with regard to ESN changes. Title 18 is sufficient to prosecute criminal activity. Any attempt to further regulate the cellular market serves only the interest of the common carriers, which want to maintain monopolistic practices.

The problems that exist today are a direct result of non-compliance by most manufacturers of cellular telephones. If FCC rules been followed, with regard to ESN chip design and manufacture, all of the current dialogue about ESN changes would be moot! These telephones do not meet type acceptance set forth by the FCC.

We are hopeful that the FCC will see the fallacy of declaring all cellular telephones, past and present, with ESN changes as "illegal transmitters. There are several inherent problems with this approach.

1. If phones reprogrammed and used by individuals or companies are "illegal transmitters" then all phones with a modified ESN should be considered in this category. To declare only "some" illegal and others programmed by "authorized" service centers as legal would be unequal enforcement of FCC rules. We are certain that the FCC is not so naive as to think that these service centers do not perform, and will continue to do so, ESN changes for select customers.
2. Since this issue centers around "type acceptance" then all telephones manufactured that have not met FCC mandates, both past and present,, should also be declared "illegal transmitters" and recalled and replaced by the manufacturers.

3. By establishing arbitrary rules, such as those that have been suggested by the CTIA, which prohibit targeted groups from modifying ESN chips and allowing others to do so with no punitive action, amounts to selective enforcement. Again, the ISCA believes this kind of action by the FCC is ill advised and does not address the real issues. It is merely "smoke and mirrors" designed by special interest groups that desire to eliminate competition.

Targeting companies that perform ESN modifications are based upon economics, not fraud! The suggested rule changes that prohibit the reprogramming of cellular telephones in order to create an "extension" phone does not serve the public's best interest, nor does it foster fair and open competition. The letter from the Small Business Administration<sup>1</sup> to the FCC strikes at the very heart of this subject. Instead of adopting an adversarial role, we believe that a more productive approach would be one of cooperation between those offering "extension phone" services and the carriers.

The market is certainly large enough to accommodate competition at all levels. To stifle it serves only to deprive the public of choice. Past comments have voiced numerous reasons as to the benefits of allowing competition to flourish. We will not, therefore, reiterate them. However, we would like to point out that the technical concerns that have been raised by the carriers disappear when the subscriber keeps one of the two telephones in the "off" positions. This is the same recommendation presented by the carriers. Past comments have failed to substantiate or document these purported problems. As with the wired network, no system is perfect. Minor problems will no doubt occur. However, through a cooperative relationship these can be addressed quickly to everyone's satisfaction.

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<sup>1</sup> Enclosure One

The ISCA was formed to establish standards for companies performing "extension" services and to inform the public of policy changes regarding cellular communications. Our members perform services for registered subscribers only. Identification is always required! This is what differentiates "real" fraud from our member's business. The carriers are not deprived of air time or toll charges. Our research cannot find any source, including the carrier's license agreement, that gives the carrier a total and unrestricted right to all of the revenue generated in the cellular market.. Factually, the more cellular telephones in the market, the more air time that will be used. This benefits the carriers revenue base! It does not detract from it.

Surveys conducted, overwhelming demonstrate that users of "extension" phones would not activate an additional cellular number if our service was not available.

It is our recommendation that the FCC adopt the following procedures:

- Make no changes to FAR 22.919 as published in the November 17, 1994 issue of the Federal Register. To do so serves only the interest of the CTIA and common carriers.
- Enforce FAR 22.919 as currently published. This will have a positive impact on real fraud.
- Do not over-regulate the cellular industry through arbitrary rules. Competition is healthy and serves the interest of the public.
- Do not regulate the industry so as to punish the public for looking at alternatives to the carriers.
- Allow all interested parties to make ESN modifications. There are 50+ manufacturers of cellular telephones. Not all service facilities can accommodate all phones. To do otherwise would be punitive to the general public which own a variety of phones.

- Promote a cooperative spirit among “extension” providers, carriers and the FCC. Our

Associations members are willing work with the carriers which will benefit the public.

ISCA members are willing to work with the FCC and carriers regarding this matter. Our goal is to set standards for conducting honest and ethical business. To enhance cooperation and eliminate real fraud, we suggest the following:

1. All ISCA Members register with the FCC.
2. ISCA Members furnish customer list to the FCC and carriers (provided the carriers take no punitive action against our customers).
3. Work with the carriers to promote customer awareness of real fraud issues.
4. Work together in a common goal of eliminating criminal fraud (theft of air time and toll revenues)..



U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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Honorable Reed Hundt  
Chairman  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

Dear Chairman Hundt:

On December 19, 1994, a number of petitions for reconsideration were filed in response to the Commission's Report and Order in CC Docket No. 92-115, Revision of Part 22 of the Commission's Rules Governing the Public Mobile Radio Services (September 9, 1994). The Office of Advocacy has reviewed this material and believes that the Commission should grant the petitions for reconsideration to address the very important small business issues raised by the petitioners.

As you know, the Commission issued a notice of proposed rulemaking to revamp the licensing of commercial mobile radio services in 1992. The Office of Advocacy filed extensive comments in response to that notice and our comments focused almost exclusively on efforts to improve the licensing regime for paging operators.<sup>1</sup> The Commission adopted our suggestions that Part 22 applications not be permitted on first come, first serve basis and that multichannel transmitters for paging service be approved. The Office of Advocacy commends the Commission for taking these vital steps in ensuring that only serious and viable candidates are considered for licenses pursuant to Part 22.

In the notice of proposed rulemaking, the Commission offered a potential solution to cellular telephone fraud.<sup>2</sup> According to the Commission, tampering with the cellular telephone's

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<sup>1</sup> Until contacted by small businesses involved in reprogramming cellular telephones, the Office of Advocacy was not aware of the significance of the Commission's action with respect to cellular licensees.

<sup>2</sup> The Office of Advocacy's support of the petitions for reconsideration in no way condones the use of technology to defraud holders of cellular telephone licenses. Thus, the Office of Advocacy strongly endorses efforts by the Commission and appropriate law enforcement agencies to prosecute, to the full extent of the law, those businesses that reprogram cellular telephony equipment for customers who do not have a valid contract with an appropriate cellular licensee or reseller.

electronic serial number (ESN) has increased the opportunity for theft of cellular telephone service. The proposal found strong support from the cellular telephone industry. However, strong opposition was raised by companies that reprogram cellular telephones to emulate an ESN on another telephone; in essence creating an extension cellular telephone.<sup>3</sup>

The Commission adopted the proposed rule for three reasons. First, the Commission found that simultaneous use of cellular telephone ESNs, without the cellular licensee's permission, could cause problems in some cellular systems such as erroneous tracking or billing. Second, use of ESNs without the licensee's permission could deprive cellular carriers of monthly per telephone revenues to which they are entitled. Third, telephones altered without licensee permission would be tantamount to the use of unlicensed transmitters in violation of § 301 of the Communications Act. An examination of these rationales demonstrates that the Commission is more interested in protecting cellular telephone company revenue than preventing fraud.

First, the Commission cites no evidence that a company like C2+ or one of the many smaller businesses that reprogram ESNs for valid customers of cellular telephone companies is committing fraud, i.e., stealing service for which the reprogrammer's customers are not subscribers to the telephone licensee's cellular service. The petitioners have offered to provide a computerized database, if necessary, of their customers to cellular telephone companies to show that only customers with valid cellular contracts are receiving the reprogramming of ESNs. Nothing in the record demonstrates that this option would not be adequate in preventing fraud.<sup>4</sup>

Second, the Commission seems to believe that cellular telephone companies have some unbridled right to revenue. Prohibiting the use of ESN reprogramming would simply ensure that current cellular licensees capture all of the revenue associated with providing one-number cellular telephony to multiple cellular

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<sup>3</sup> As with an extension telephone in the home, two cellular telephones with the same ESN could not be used simultaneously. And two cellular telephones with the same ESN could be not be used to make calls to each other.

<sup>4</sup> Obviously, unscrupulous businesses could reprogram cellular telephones without obtaining evidence of a valid contract between the customer and the cellular telephone company. However, the Commission's prohibition still would not prevent the operation of unscrupulous operations. It would simply make illegal currently legal operations and change law-abiding citizens into criminals by the stroke of the regulators' pen.

telephones.<sup>5</sup> Nothing in the Communications Act mandates that cellular telephone companies are entitled to any specific amount of revenue, for use of a public resource.<sup>6</sup>

The Office of Advocacy does not believe that the Commission has stated adequate grounds in support of its prohibition on reprogramming cellular ESNs. The Office of Advocacy believes that the petitioners have raised legitimate issues that need a full reexamination. Furthermore, the petitioners have offered a number of protections to cellular licensees to insure that fraud is kept to a minimum.<sup>7</sup> The Office of Advocacy fully supports the petitioners efforts to maintain their businesses (most of which are relatively small), provide a useful service to many cellular customers, and ensure the existence of competition to cellular licensees in the provision of one-number cellular service.

Sincerely,

*Jere W. Glover*

Jere W. Glover  
Chief Counsel for Advocacy

cc: Honorable Andrew Barrett, Commissioner  
Honorable Rachelle Chong, Commissioner  
Honorable Susan Ness, Commissioner  
Honorable James Quello, Commissioner

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<sup>5</sup> The record is replete with examples of cellular telephone companies offering one number for multiple telephones but with their service the customer would have to pay a monthly charge for the feature.

<sup>6</sup> Unlike their wire-line telephony siblings, cellular telephone companies face direct competition with another cellular telephone provider, resellers of cellular service, and soon, personal communication service providers. The Office of Advocacy does not understand why cellular telephone companies deserve the right to all revenue from one number for multiple cellular telephones when the Commission is trying to increase competition in wireless service.

<sup>7</sup> It would indeed be naive of the Commission to believe that any regulatory regime, including prohibition, would eliminate fraud. That would require a change in human nature -- not even something the Commission appears to have the power to modify.